(1)

Supreme Court, U.S.
FILED

95-792 OCT 23 1995

OFFICE OF THE CLERK

No _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

CAPTAIN J.P. TRISTANI, et al,
Petitioners,
vs.
FRANK LORENZO, et al,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Moreton Rolleston, Jr.
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Atlanta, Georgia 30339
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Attorney for Petitioners

QUESTIONS PRESENTED FOR REVIEW

1.

Whether the dismissal of the Complaint by the District Court, which was affirmed by the Second Circuit, without a ruling by either Court on Tristani's pending Motion for Summary Judgment and Motion for Default Judgment and without a non-jury or jury trial, constitute a denial of procedural and substantive due process.

2.

Whether parties are entitled to a jury trial in an Article III court when their claims are based on a tort injury and a breach of contract arising from state law, upon the Federal RICO Statute (Chapter 18 U.S.C.) and upon 1983 Discrimination

Statute (42 U.S.C.§1983), all of which are independent of the Chapter 11 Bankruptcy Statute.

LIST OF ALL PARTIES

The following is a list of all

Plaintiffs:

Captain J. P. Tristani

Captain Roger Wyatt

Captain Moreton Rolleston, III

Captain Kenneth W. McDonald

Captain Fred Kruger

Captain Paul White

Captain Roger W. Tracy

Captain George Hill

Captain Frederick H. Mesmer

Captain Lawrence A. Link

First Officer James Hughes

Mrs. Tom Welch (in place of
Tom Welch, deceased)

The following is a list of all **Defendants:**

Frank Lorenzo

Texas Air Corporation

Jet Capital Corporation

Trust Administrative Committee of
of B. Plan as the Fiduciary of
of B. Plan

Hawthorne Associates, Inc.

Texas Air Corporation and Jet Capital Corporation are now known as Continental Holdings, Inc. and/or Continental Airlines; Tristani does not know the exact corporate ownership of these entites.

TABLE OF CONTENTS

Page(s)

1. Questions Presented For Review..... i

2. List of All Parties..... iii

3. Table of Authorities..... vi

4. Reference To Other Opinions In Case..... 1, 2

5. Grounds on Which Jurisdiction is Envoked..... 2

6. Date of Entry of Judgment of the Second Circuit..... 2

7. Statutory Jurisdiction..... 2

8. Statement of Case..... 3

9. Opinion of the Eleventh Circuit Sought To Be Reviewed..... A-1

10. Order of U.S. District Court for the Northern District of Georgia, Atlanta Division..... B-1

TABLE OF AUTHORITIES

Page

CASES

In Re Ben Cooper, Inc., et al vs. The Insurance Co. of the State of Pennsylvania, et al, 869 F2d 1394..... 13

Granfianciera, S.A., et al v. Nordberg, Creditor Trustee For The Estate of Chase & Sanborn Corp., fka, General Coffee Corp., (Case No. 87-1616) (11th Cir. 1989)..... 14

The Insurance Company of the State of Pennsylvania and Kerwick & Curran, Inc. vs. Ben Cooper, Inc., Case No. 89-1784..... 13

In Re Kaiser Steel Corp., No. 90-1013 (10th Cir. Aug.10, 1990) 911 F2d 380, p.389..... 12

In Re United Missouri Bank of Kansas City, n.a.,901 F2d 1449 (8th Cir. 1990)..... 12

STATUTES

	Page(s)
18 U.S.C. §1961 and 1962.....	4
28 U.S.C. §1254 (11).....	2
28 U.S.C. §1332.....	4
42 U.S.C. §1983.....	4
11 U.S.C. §157.....	3
United States Constitution, Fifth Amendment.....	(i), 2, 11, A-3
United States Constitution, Fourteenth Amendment.....	(i), 2, 11, A-4

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The opinion of the United States Court of Appeals for the Second Circuit, which is set forth in the Appendix, "summarily affirmed" the

opinion of the U.S. District Court for the Southern District of New York. (Appendix A-1)

The grounds upon which jurisdiction of this Court is invoked are: (1) the denial of due process as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States and (2) the divergent of opinions of the 2nd, 8th, 10th and 11th Circuits.

The date of entry of the Second Circuit Judgment is July 31, 1995.

The jurisdiction of this Court to review the order of the U.S. Court of Appeals for the Second Circuit is invoked under 28 U.S.C.

§1254(11), (Rule 14 (e) (iv)).

STATEMENT OF CASE

One of the defendants in the original complaint was Eastern Air Lines, Inc. (Eastern). The complaint was filed in the U.S. District Court for the Northern District of Georgia, Atlanta Division, on **2/12/90**, after Eastern had filed Chapter 11 Bankruptcy in the New York Bankruptcy Court.

The Bankruptcy Court invoked the automatic stay provision under 11 U.S.C. 157 and issued an injunction against further prosecution of the complaint in the Atlanta District Court.

Responding to an order of the Atlanta District Court, Eastern

filed a motion to dismiss with brief; Tristani filed a brief; and the District Court granted the motion to dismiss on 8/31/90. Tristani filed a notice of appeal to the Eleventh Circuit. Oral argument before the Eleventh Circuit was on 11/14/90 and the Eleventh Circuit issued its opinion on 11/20/90 by which it ordered the case transferred to the U.S. District Court for the Southern District of New York.

The District Court had jurisdiction of this action under 18 U.S.C. §1961 (1) (B), and §1962 (a), (b), (c) and (d) (RICO); 42 U.S.C. §1983 (Deprivation of Rights); 28 U.S.C. §1331 (Federal

Question); 45 U.S.C., sub-chapter I (Railway Labor Act) and 28 U.S.C. §1332 (Diversity of Citizenship). (Rule 14 (i)).

Tristani filed a motion for **default judgment (4/16/90)** because none of the defendants have ever filed answers to the complaint. On **6/21/90** Tristani filed motion for **partial summary judgment**. Neither the Atlanta District Court, the New York Bankruptcy Court nor the New York District Court have ever ruled on the motions for default judgment and for summary judgment.

On 11/30/94 the New York Bankruptcy Court disallowed Tristani's claim **against Eastern** but that Order did not contain any ruling or any

determination regarding Tristani's claims against the other defendants in the original Tristani complaint. Tristani appealed this ruling and on 4/21/95 Judge Leonard Sand of the New York District Court denied the appeal as untimely. The appeals from that Order to the Second Circuit were assigned Case Numbers 95-5047 (Lead), 95-5048, 95-5052 and 95-5053.

The Second Circuit upheld the District Court's ruling that the appeal of the order regarding Eastern was untimely. This appeal does not involve this ruling.

On **5/23/95** Judge Sand issued another order and from this order Tristani filed a second appeal,

which was timely and within the time allowed. This second appeal was assigned Case Numbers 95-5058 and 95-5059 in the Second Circuit.

Then in a separate opinion the Second Circuit entered an order, entitled Docket No. 95-5059, which reads as follows:

> "It is hereby ordered that the motion be and is hereby granted in that the order of the District Court is summarily affirmed." (Appendix A-1)

This second order of the Second Circuit pertained only to Docket No. 95-5059 (and Tristani) and had nothing to do with the previous ruling of the Bankruptcy Court or

the N.Y. District Court regarding Eastern.

Therefore, Tristani has not had his day in court. It has now been almost six years since the original complaint was filed in the Atlanta District Court. The following statement appears supra, but with the Court's indulgence we need to state the fact again that **the complaint of Tristani against Lorenzo and all the other defendants, except Eastern, has never been tried before any court or jury and that the Atlanta District Court, the 11th Circuit, the New York District Court, the New York Bankruptcy Court and the 2nd Circuit** have never even mentioned the

question raised by motion for default judgment and motion for summary judgment filed by Tristani in 1990.

Tristani has asked for trials; has offered to submit said motions on briefs; has asked for the complaint to be bifucated and for the New York District Court to try the issues and claims against all the defendants except Eastern, and has asked the New York District Court to transfer the case back to the Atlanta District Court for trial against all defendants except Eastern.

Texas Air Corporation and Jet Capital Corporaton are now known as Continental Airline Holdings, Inc.

and/or Continental Airlines, Inc. The other named defendants are Frank Lorenzo, Trust Administrative Committee of B. Plan as the Fiduciary of B. Plan and Hawthorne Associates, Inc.

FIRST QUESTION FOR THE COURT

This writ should be allowed because this case is an unbelievable, flagrant and undeniable denial of procedural and substantive due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Until the last door was shut July 31, 1995 by the Second Circuit, Tristani could not anticipate that there would be

no trial and no rulings. Tristani's counsel has practiced law for forty years and has never heard of, read about or experienced such total disregard of the rights of parties by refusing to rule or to try.

SECOND QUESTION FOR THE COURT

This writ should be allowed because Tristani's appeal from the order of Judge Sand dated 5/23/95, was timely and properly filed. There is no explantation why Judge Sand issued the second order and it is not clear if it was meant to dismiss Tristani's complaint against Lorenzo and other defendants, except Eastern; but, nevertheless, the Second Circuit entered an order

affirming Judge Sand's order of 5/23/95. The Clerk of the District Court has advised counsel that this case is closed. Hence this Certiorari.

We contend that the Bankruptcy Court had no authority to conduct a jury trial, which was demanded against all the defendants, including Eastern.

The Eighth and Tenth Circuits have held that Bankruptcy Courts can not conduct jury trials, even in core proceedings. See In Re United Missouri Bank of Kansas City, n.a. 901 F2d 1449 (8th Cir. 1990). In re Kaiser Steel Corp., No. 90-1113 (10th Cir. Aug.10, 1990) 911 F2d 380, p.389. The Second Circuit held

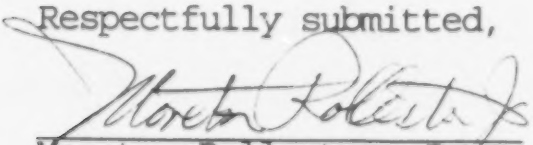
just the opposite, that is, that a Bankruptcy Court could conduct a jury trial in a core proceeding. In re Ben Cooper, Inc.,et al vs. The Insurance Co. of the State of Pennsylvania, et al, 896 F2d 1394, this Supreme Court granted certiorari to the Second Circuit but on November 13, 1990 remanded the case to determine jurisdiction. See The Insurance Company of the State of Pennsylvania and Kerwidk & Curran, Inc., v. Ben Cooper, Inc., Case No. 89-1784.

The Eleventh Circuit agreed with the Second Circuit that a Bankruptcy Court could conduct a jury trial but on June 23, 1989 this Court reversed the Eleventh Circuit in

Granfianciera, S.A. et al v. Nordberg, Creditor Trustee For The Estate of Chase & Sanborn Corp., fka. General Coffee Corp. (Case No. 87-1616) 109 Supreme Court 2782 (June 23, 1989).

The concept of due process has been desecrated in this case. This writ should be granted.

Respectfully submitted,



Moreton Rolleston, Jr.
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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

95-5059

NOTICE OF MOTION

for dismissal, or, in the alternative, summary affirmance

Tristani

v.

Eastern Air Lines

(Stamp)

United States Court of Appeals

Second Circuit

(Motion) Filed July 14,1995

George Lange, III, Clerk

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is granted in that the order of the district court is summarily affirmed.

(Stamp)

United States Court of Appeals

Second Circuit

Filed July 31, 1995

George Lange, III, Clerk

/s/J. Daniel Mahoney

/s/ Pierre n.Leval (JDM)

/s/ Guido Calebresi (JDM)

Circuit Judge

7/31/95

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

95-5059

NOTICE OF MOTION

for dismissal, or, in the alternative, summary affirmance

Tristani

v.

Eastern Air Lines

(Stamp)

United States Court of Appeals

Second Circuit

(Motion) Filed July 14,1995

George Lange, III, Clerk

B-2

ISSUED AS MANDATE:

July 31, 1995

IT IS HEREBY ORDERED that the motion be and it hereby is granted in that the order of the district court is summarily affirmed.

(Stamp)

United States Court of Appeals

Second Circuit

Filed July 31, 1995

George Lange, III, Clerk

/s/J. Daniel Mahoney

/s/ Pierre n.Leval (JDM)

/s/ Guido Calebresi (JDM)

Circuit Judge

7/31/95

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Moreton Rolleston, Jr.
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Atlanta, Georgia 30339
770-850-1816
Attorney for Petitioners

C-1

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CAPTAIN J.P. TRISTANI,
et al,

Plaintiffs

-against-

EASTERN AIR LINES,
FRANK LORENZO,
TEXAS AIR,
JETS CAPITAL CORP,
et al

95 Civ 0340(LBS)
95 Civ 0343(LBS)
95 Civ 0344(LBS)
95 Civ 0347(LBS)

US District Court
Filed
May 23,1995
S.D.Of N.Y.

Whereas the above-entitled actions having come before the Honorable LEONARD B. SAND, U.S.J.D., and the Court thereafter on April 27, 1995 having handed down its opinion (74666) and order dismissing the appeals as untimely with the consequence that this Court lacks jurisdiction. Were a timely request

before this Court for extension of time based on excusable neglect, we would deny such request. This disposition renders moot the application of Moreton Rolleston, Jr. to appear pro hac vice and it is on that ground denied.

ORDERED: That the appeals are hereby dismissed.

DATED: NEW YORK, NEW YORK

May 23, 1995

/S/ James M. Parkinson

Clerk

D-1

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CASE NUMBERS

95-Civ-0340 (LBS)
95-Civ-0343 (LBS)
95 Civ-0344 (LBS)
95-Civ-0347 (LBS)

CAPTAIN J.P. TRISTANI,
CAPTAIN ROGER WYATT,
CAPTAIN MORETON ROLLESTON, III,
CAPTAIN KENNETH W. MCDONALD,
CAPTAIN FRED KRUGER, CAPTAIN
PAUL WHITE, CAPTAIN ROGER W.
TRACY, CAPTAIN GEORGE HILL,
CAPTAIN FRED H. MESMER, JR.,
CAPTAIN LAWRENCE A. LINK,
FIRST OFFICER JAMES HUGHES
and MRS. MARY P. WELCH,

Plaintiffs

-against-

US District Court
(Received)
Oct. 5,1995
S.D.Of N.Y.

FRANK LORENZO,
TEXAS AIR CORPORATION,
JET CAPITAL CORPORATION
et al

Defendants.

NOTICE OF MOTION

TO: Mr. David Brown, Smith, Gambrell

& Russell, Suite 3100, Promenade II, 1230 Peachtree Street, N.E., Atlanta, Georgia 30309; Mr. John F. Wirenius, Solovay, Marshall & Edlin, 845 Third Avenue, New York, New York 10169 and Lee D. Unterman, Broudy & Jacobson, 230 Park Avenue, New York, New York 10169.

Please take notice that the within **Motion To Transfer To Atlanta District Court Or, In The Alternative, For A Non-jury Hearing On The Pending Motions By Plaintiffs** will be presented to the Court on October 24, 1995 or at such other time as the Court may direct.

/s/ Moreton Rolleston, Jr.

D-3

Attorney for Tristani

Ga. Bar 613700

MR6421

Suite 1870- Riverwood 100

3350 Cumberland Circle, n.W.

Atlanta, Georgia 30339

ENDORSMENT

This case is closed.

Motion denied as moot.

So ordered.

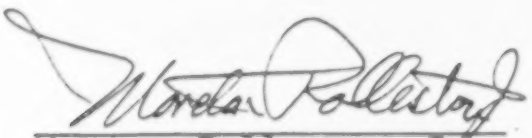
L.B. Sand

U.S.D.C.

11/2/95

Respectfully submitted this

17th day of November, 1995.



Moreton Rolleston, Jr.